COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss. No. SJC-9849

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff/Appellee

v.

DANIEL PRUNTY,
Defendant/Appellant

ON DIRECT REVIEW
FROM JUDGMENT OF CONVICTION
IN THE SUPERIOR COURT

BRIEF AND RECORD-APPENDIX OF DEFENDANT/APPELLANT DANIEL PRUNTY

Charles W. Rankin, BBO #411780
crankin@rankin-sultan.com
Jonathan P. Harwell, BBO #662764
jharwell@rankin-sultan.com
Rankin & Sultan
151 Merrimac Street
Boston, MA 02114
(617) 720-0011

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ISSUES PRESENTED

1. Did the trial court err in requiring defense counsel to provide an explanation for his peremptory challenge of a prospective juror, when there was no prima facie showing of impropriety?

2. Did the trial court err in rejecting as a sham defense counsel's detailed and case-specific explanation for the peremptory challenge?

3. Did the trial court err in refusing the dismiss the juror for cause when he was unable to state unequivocally that he believed he could be fair?

4. Did the trial court err in not allowing the defendant to exercise a peremptory challenge on the juror, after he learned of the jurors' personal experiences and observed the juror's inability to state that he believed he could be fair?

5. Did the trial court err in instructing the jury that prior statements could only be considered for impeachment purposes, where important prior statements had been introduced substantively?

6. Is a new trial required under §33E where the defendant was not able to challenge or excuse a potentially partial and unwanted juror and the jury was not allowed to consider important evidence?

PRIOR PROCEEDINGS

Defendant Daniel Prunty ["Prunty"] was indicted by a Barnstable County grand jury on August 31, 2004, for first-degree murder, assault and battery with a dangerous weapon, and attempted extortion. Trial commenced on February 7, 2006, before the Honorable Gary A. Nickerson and a jury. On February 15, 2006, the jury found Prunty guilty on all three charges. On that day, he was sentenced to life imprisonment on the first-degree murder

conviction and to concurrent sentences of 12-15 years for attempted extortion and 7-10 years for assault and battery with a dangerous weapon. Prunty filed a timely notice of appeal from his conviction on March 8, 2006.

STATEMENT OF RELEVANT FACTS

I. OVERVIEW OF TRIAL.

Many of the facts at trial were essentially undisputed. There were a number of people at Prunty's house in Sandwich, Massachusetts, on August 6, 2004, relaxing and using drugs. On August 7, Prunty discovered that some money and jewelry had been stolen from the house. Sometime that day, while several other people were present in the house, he confronted Jason Wells and accused him of the theft. Prunty obtained a rifle from his bedroom and pointed it at Wells' head at some point during this encounter. Later that same day, Wells was killed by a single bullet from that rifle fired into his forehead.

In statements to the police given after the shooting, Prunty denied pulling the trigger and claimed that he was down the hall when the shot was fired. He did admit that he had pointed the gun at Wells shortly beforehand, and that he had threatened him. The Commonwealth's theory was that Prunty had shot Wells. Defense counsel suggested that another individual in the

house, Christopher Rose, may have shot Wells accidentally, or that Wells may have shot himself.

II. COMMONWEALTH'S EVIDENCE.

A. Law Enforcement Witnesses.

Officers testified that they responded to a call at 4:47 p.m. on August 7. When they arrived, Prunty and another man, Chris Rose, were outside. Prunty said that there was somebody in the house who he thought had shot himself and who he thought was dead. Prunty told them that he had taken a rifle out of the closet to threaten Wells because he thought Wells had stolen some jewelry from him. He said he had the magazine in his pocket while he was pointing the rifle at Wells. Wells' body was found in the kitchen. Prunty told the officers that he was at the end of the hallway talking to Rebecca Pape when the shot went off. *Tr.* 2/7/06 at 139-160.

The Commonwealth introduced recorded jail phone calls between Prunty and Pape. In those calls, Prunty repeatedly denied any guilt, and Pape agreed. However, at one point Pape told him: "Me and you were in the bathroom when the gunshot went off," and he responded, "I thought we were in the hall. I told the cops we were in the hall." Pape then stated: "Now the story is all fucked up." *Tr.* 2/8/06 at 240-250.

B. Civilian Witnesses.

The Commonwealth introduced the testimony of several civilian witnesses who were present at the time of the argument between Prunty and Wells. *Tr.* 2/8/06 at 280 (Kate Finnegan); *id.* at 315 (Mark Rosa); *id.* at 325 (Michaela Davenport).

C. Forensic Testimony.

Dr. William Zane testified that there was a gunshot wound to Wells' head. The gun was inches away from the skin of the forehead when fired, not pressed against the skin. There were also three other lacerations to his face. Wells had cocaine in his system. *Tr.* 2/9/06 at 371-385.

D. Rebecca Pape.

1. Testimony for the prosecution.

Rebecca Pape testified that she was addicted to heroin, and purchased it from Prunty. She was also a friend of Jason Wells. Together they made a plan to rob Prunty, and they did so. She, along with Wells, Finnegan, Davenport, and Rosa, stayed at Prunty's house on the night of August 6. They left the next day. Later that day she received a phone call from Prunty, who was upset because he was missing money and jewelry. She, Rose, Davenport, and Rosa went to Prunty's house, where Prunty and Wells were arguing about the money and

jewelry. *Tr.* 2/9/06 at 399-407.

At one point, Prunty went upstairs and came down with a gun. He accused Wells and Pape of stealing from him. He pointed the gun at Wells' head, and cocked it. Rose intervened, and said he would help Wells get the items back. They then went into the kitchen, and Wells began to make calls to retrieve the items. Pape went down the hallway. Pape said that when she turned to come back she saw Prunty pointing the gun at Wells' head and they were arguing when the gun "just fired." Prunty told Pape to say that she didn't see anything, that she was in the bathroom with him, and that Wells had killed himself. *Id.* at 407-417.

2. Pape's earlier accounts of the homicide.

a. Direct examination.

Pape admitted to having made a great number of prior statements that differed from her trial testimony and exculpated the defendant.[1/] On direct examination, Pape agreed that she told the police that Prunty was in the bathroom with her at the time of the shooting, but that was a lie. *Id.* at 424. She admitted she told the police the same thing the next day. *Id.* at 425. She agreed

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[1/] These prior accounts are relevant to an appellate issue discussed below, in that they were admitted without limitation but the judge subsequently instructed the jury that it could consider them for their impeachment value only.

that she also told the grand jury that Prunty was in the bathroom with her at that time. *Id.* at 426. She agreed that, in a recorded telephone call with Prunty, she told him: "And me and you were in the bathroom when that gunshot went off." *Id.* at 427.

b. Cross-examination regarding conversations with Lamos.

On cross-examination, defense counsel dwelled at length on the details of some of these prior statements. Pape admitted that she had conversations with her boyfriend, Confessor Lamos, on August 8, 2004. She was questioned:

> Q: And you said to Mr. Lamos on the phone, did you not, "I watched Jason blow his brains out of his head last night." Is that right?
>
> A: Yes.
>
> Q: And then you further stated in the conversation, "Jason Wells blew his brains out of his head last night." Is that correct?
>
> A: Yes.
>
> ...
>
> Q: My question again, ma'am, was you told Confessor Lamos then, "I don't know, Dude. He killed himself or something. I don't know." Is that correct?
>
> A: Yes.
>
> Q: Later on in the conversation, do you remember him again asking you, "What happened?" And you said, "How did I know someone was going to blow -- he was going

> to blow his brains out, Dude? I'm supposed to be -- I predict these things?" Do you recall saying that?
>
> ...
>
> A: [After having her recollection refreshed] Yes.

Id. at 450-453, R.63-66. Pape also agreed that she had told Lamos: "All I know is fucking I heard a fucking gunshot and fucking looked in, and there was fucking Jason on the floor with a fucking bullet through his brain." *Id.* at 453-454, R.66-67.

Pape was further questioned about whether she had concocted a plan with Lamos to implicate Prunty:

> Do you recall saying -- Lamos telling you, "Yeah. So, I'm going to tell them, yeah, he did it," meaning Mr. Prunty. You saying, "What?" He said, "I'll say he did it." And you telling him, "You're a fucking retard. Why would you even say something like that? I got to go. Why would you even say something like that on the fucking phone. Are you fucking serious."...
>
> ...
>
> A: [After being refreshed] Yep.

Id. at 458-459, R.71-72. Pape and Lamos then discussed whether both of their cases would be dropped if they testified in the murder case. *Id.* at 459-460, R.72-73.

Pape and Lamos discussed her potential grand jury testimony:

> Q: ... You saying, "It cuts him out of the being -- of being charged with murder. My testimony does. It may be helping

him, you know what I mean; but it's the truth. And then they're going to go after Chris. You know what I mean?"

...

Q: You were saying you weren't going to give them Dan Prunty. Your testimony, if anything, would be excluding Dan Prunty as the shooter; isn't that right?

A: Yes.

Id. at 466-467, R.79-80.

Later, Pape and Lamos again discussed where Prunty was at the time of the shooting:

Q: Do you recall a conversation where you said, "Because I'm telling them the truth; that Dan was in the bathroom with me, and they don't believe it." And Lamos saying, "Oh, he was in the bathroom with you?" And you saying, "Yes." ... "He kept coming to the bathroom to fucking apologize to me. I said, Leave me alone...."

Q: And again, you were telling Mr. Lamos that the truth was that Mr. Prunty was in the bathroom with you; is that correct?

A: Yes.

Id. at 470-471, R.83-84.

c. Cross-examination regarding conversation with Prunty.

Defense counsel also inquired about a conversation between Pape and Prunty:

Q: ... You said, "What? There is nothing to talk about. I went to the DA today and told him -- I told them exactly the whole story."... And Mr. Prunty asking you, "What story?" And you said that, "You were in the bathroom with me when the

shot was fired. There is no way that you could have killed anybody." Did you remember that?

A: Yes.

Q: And you remember telling Mr. Prunty, "Yes" -- when he asked you, "You told him that?" And you saying, "Yes, and they don't believe me. They're telling me they're going to hold me on perjury and give me as much time as you get if I don't come up with the truth." Do you recall that?

A: Yes.

Id. at 472, R.85. They continued:

Q: You further said, "You were in my sight in the bathroom when the gun went off. These cops won't believe me. They keep on telling me that they're putting me in jail because they want someone to blame for the murder." Do you recall that?

A: Yes.

Id. at 476, R.89.

d. Cross-examination regarding conversations with law enforcement.

Pape agreed that she had told Trooper Burke that Rose asked her to lie for him so that he was not the only one near the body when the shot was fired, and that Prunty had been in the bathroom with her. *Id.* at 483-484, R.96-97.

e. Cross-examination regarding grand jury testimony.

Defense counsel asked Pape about her testimony before the grand jury.

Q: This proceeding was under oath; is that right?

A: Correct.

...

Q: Right? And on that day, right, we're only 24 days after the murder, you again say, "He came into the bathroom a few times. And I recall at one point hearing a gunshot." "Where were you when that gunshot was fired?" "I was in the bathroom." "Where was Dan, if you know?" "I recall Dan being in the bathroom with me when that gun was fired." Do you recall testifying to that before a Grand Jury?

A: Yes.

Q: That same day, ma'am, August 31, 2004, you were indicted for perjury, weren't you?

A: Yes.

Q: And it was perjury for your testimony before the Grand Jury, right?

A: Correct.

Id. at 488-489, R.101-102.

f. Cross-examination regarding miscellaneous subsequent conversations.

In a later phone call to Lamos, she told him that she told the truth to the grand jury that Prunty was in the bathroom with her, and that Prunty did not commit the murder. *Id.* at 493, R. 106. In a phone call to her mother, she told her also that Prunty had not killed anyone. *Id.* at 497-499, R. 110-112. Defense counsel

also played a taped interview between Pape and a defense investigator, in which Pape indicated that Prunty was in the bathroom at the time the shot was fired. *Id.* at 513-516, R. 126-129.

The prosecutor did not object to any of these questions or request any contemporaneous limiting instruction.

E. Richard Ford.

Ford testified to the argument between Wells and Prunty. He said that, eventually, Wells began crying. Prunty yelled at him: "You're my friend. How could you do it?" Wells said: "I'm sorry." Prunty repeated: "You were my friend, how could you steal my shit? I should kill you." Five second later, Ford heard a gunshot, a loud thud, and then yelling, screaming, and people running out of the house. *Tr.* 2/10/06 at 536-560.

F. Christopher Rose.

Rose testified that Pape was his ex-girlfriend, and Wells was a friend of his. He was present during the argument at Prunty's house. He saw Prunty put a gun to Wells' head, and Wells began crying. Rose intervened, and "told him to put the damn thing away." Wells then used the telephone, and then began arguing with Prunty again. Prunty said if he didn't get his "friggin' shit back," he was going to kill Wells. Pape was also yelling

at Wells in the kitchen. Prunty began to calm down, and Rose told him to let Wells use the phone to retrieve his stuff. Rose testified that when Wells tried to use the phone, he walked away, and then he heard a shot. Prunty had been pointing the gun at Wells just before that. Rose went back into the kitchen, and Prunty told him not to say anything. Prunty told him that Wells shot himself. *Tr.* 2/10/06 at 585-613.

Rose admitted that he did not tell the truth to the police or the grand jury, but claimed that the truth was that Prunty shot Wells. *Id.* at 613-615.

G. Prunty's Statements to Law Enforcement.

Trooper Kotfila interviewed Prunty at the police department in the early evening of August 7, 2004. Prunty detailed the theft of his property, and gave his version of events. He said he confronted Wells for the theft, and Wells blamed Pape. Prunty then called Pape, who then came to his house. She then accused Wells, who admitted his involvement. Prunty gave him until the next day to get the items back. He got a gun from upstairs and threatened Wells. He put the gun on the counter (the clip was in his pocket) and went to talk to Pape. While he was apologizing to her in the hallway, he heard a gunshot, ran into the kitchen, saw Wells on the floor bleeding, and called 9-1-1. He said he didn't know where

Wells got the bullet from. He told Kotfila: "This nigger came up from Hyannis and ripped me off. I'm not some chump you can rip off." *Tr.* 2/10/06 at 710-724.

Trooper Mason interviewed Prunty on August 8, 2004. Prunty told him that once Wells was using the phone to get the stuff back, Prunty put the rifle on the kitchen counter next to him and followed Pape down the hallway toward the bathroom. He followed her to apologize and give her a hug. They then returned to the kitchen, saw Wells on the phone, then headed back down the hallway. They were speaking when he heard a gunshot. He ran to the kitchen. Wells was on the floor bleeding and Rose was nearby. Rose said: "The nigger shot himself." Rose was wiping the stock of the gun with a t-shirt. Prunty called 9-1-1. *Tr.* 2/13/06 at 898-922.

H. Thomas Salimone.

Salimone, who was an inmate at Barnstable House of Corrections, testified that he frequently discussed the case with Prunty while they were in jail together. He stated that Prunty told him that he pulled the trigger. *Tr.* 2/13/06 at 840-849.

III. EVIDENCE INTRODUCED BY THE DEFENSE.

One officer testified that Rose told her on August 9, 2004, that he did not see the shooting. *Tr.* 2/13/06 at 956-958. Another officer testified that Pape told

him on August 8, that Rose told her at the time: "He blew his head off." *Id.* at 966-969. Another officer said that he spoke to Rose on August 7 but Rose never said that he saw the shooting. *Id.* at 974-977. Joseph Fagone testified that, in the late summer of 2004, he gave Pape heroin in exchange for sex. Pape told him that Prunty was being held for something he didn't do. He said that Rose was making her say things she didn't want to say. Fagone also testified that Rose told him once that someone was doing time for something that he, Rose, had done. *Id.* at 1010-1014.

IV. PROCEEDINGS RELEVANT TO JUROR ISSUES PRESENTED ON APPEAL.

A. Initial Inquiry.

During individual *voir dire*, Juror 8-8,[2/] an African-American man, was asked the standard question:

> THE COURT: In this matter, sir, the Defendant is white; the deceased was black; the witnesses may be of different races or ethnic heritage. Does this information about race and ethnic heritage affect your ability to be fair and impartial as a juror?
>
> JUROR: No.

Tr. 2/7/2006 at 82, R.27. The court then declared the juror indifferent.

[2/] Hereinafter "Juror A" or "the juror."

B. Exercise of Peremptory Challenge and Objection.

Defense counsel stated: "I'm looking to exclude the juror," indicating that he was exercising a peremptory challenge on Juror A. The Commonwealth objected. It stated:

> I just -- just on the idea that he -- I think he's the only African American potential juror that we've had in this panel; and on that basis, I'm objecting. Or at least the first African American that I've seen that was going to be seated.

Id. at 83, R.28.

C. Court's Initial Ruling.

The court stated:

> There is no pattern at this stage for -- I cannot think in my mind of any other black American who was called to serve in the impanelment process up to this point, nor did I note anyone who by physical appearance at least would appear to Claim Cape Verdean heritage or Carribean American heritage, a similar heritage.
>
> However, if my memory is right as to case law, I believe even a challenge of one can form a basis for a questionable challenge. I have reviewed the gentleman's slip, juror slip; and there is no reason for challenge that is immediately apparent from the juror slip as to his location, as to his employment, as to his spouse's employment and so forth.
>
> All things considered, I do think that the Commonwealth has met the requirement of a prima facie showing of impropriety.

Id. at 83, R.28.

D. Defense Argument that No Explanation was Required.

Defense counsel then asked to be heard on whether there had been a sufficient showing to require an explanation for the peremptory. He pointed out that there had been "two jurors that I would say are of color so far." The first was one that he characterized as a "light Hispanic." He said, "insofar as any sort of systematic exclusion of races here, we've only had two that have come before the Court; and I agreed to seat one of them." *Id.* at 84, R.29. The court stated: "At best, I think that [that juror] could be fairly said to have perhaps had Mediterranean ancestry based on physical appearance...." *Id.* at 85, R.30. Defense counsel reiterated that he believed he was of "Hispanic descent." *Id.* The court said: "I don't see it, counsel." *Id.*

E. Defense Counsel's Justification.

Defense counsel then gave a detailed explanation of the reason for his challenge of Juror A:

> I'm not sure ... the government has met its burden. Nevertheless, to articulate further, this gentleman is a -- is a school teacher with young children.
>
> Some of the people who are going to testify in this case were a relatively young age. They were in their early 20's. They were associated with drugs. They -- it appears that one of them at least and perhaps a couple of them, actually three of them -- I think the victim, Mr. Rose and Miss Pape had somewhat of a troubled history that's reflected during

their course of telephone conversations that were recorded.

That history affects how far they went in school and what they did in school. I'm informed that some of the towns down at the Cape -- I don't know in particular Barnstable public schools, but certainly I'm told the Sandwich public schools, Hyannis public schools have unfortunately been impacted rather heavily -- most recently the Sandwich public schools by alcohol and drug abuse. I feel like this type of juror would not be able to sit impartially on a case like this.

As a result of his occupation, I also bring to the Court's attention that he doesn't bring a lot of diverse experience with him in terms of who his spouse is. It appears she is an administrator, also with the Barnstable public schools. I interpret that to be perhaps a principal or a vice-principal. Typically they promote or advance to that position from a teaching position.

So, they have a very, very similar background in that regard. And I feel that he would not sit fairly in judgment of my client on a case like this.

Id. at 86-87, R.31-32.

F. Government's Response.

The Government responded:

[T]he only thing I would say, Judge, is on its face, on the face of this sheet the juror filled out, there is nothing, I would suggest, that he's anything other then [*sic*] a fair and impartial juror.

But I restate my objection. As the only African American that was going to be seated on this panel, there was a move to exclude him. That's all.

Id. at 87-88, R.32-33.

G. Court's Initial Ruling.

The court noted that there were two retired teachers that were already seated, as well as a teacher with minor children, and three other jurors with children under the age of 10 at home. *Id.* at 88, R.33. It concluded: "Based on everything before me at the moment, counsel, I must say respectfully that the proffered reason for a challenge is not bona fide, but rather is a mere sham." *Id.*

H. Initial Discussion of Racial Issues.

Having been precluded from challenging the juror, defense counsel then raised a separate concern. He stated that the Commonwealth had "several people coming in ... almost all of whom have claimed that my client is a racist." *Id.* He continued:

> [T]hey make the claim that -- that my client used the word "nigger" on multiple occasions; that he used the word in connection with the killing of Jason Wells.
>
> There is also a report that says my client refers to black people as "moon pies." I think comments like that certainly are going to perhaps get under the skin of somebody who might be a little bit more sensitive to that issue, particularly where that is their descent.

Id. at 89, R.34. He noted that the defense would contest that these statements were ever made.

The court then brought the juror back in. He clarified that he taught 9th and 10th graders at the high

school. *Id.* at 91, R.36. He had previously taught at the middle school, with 7th and 8th graders. *Id.* at 92, R.37. The court then stated:

> [T]here may be evidence brought forward where somebody involved in the case whose credibility may or may not be an issue in the case is said to have made racist comments.... If someone in the course of the evidence is accused of making racist statements, would that in any way cloud your ability to sort out issues of credibility? Who is telling the truth, who isn't? And then acting on the evidence as you find it to be?

Id. at 92, R.37. The juror responded.

> JUROR: Wow.
>
> THE COURT: Yeah, wow.
>
> JUROR: I mean, as a teacher, I've been able to, you know, separate things anyway. So, I think I would be able to do that.

Id. at 93, R.38. The juror stepped outside. Counsel noted that the Court's questions had been rather indirect. The court responded:

> Well, you saw the gentleman's reaction, just as I did now. And I must say, I -- from my own eyes, I can't imagine a more straightforward, honest response from a man.

Id. at 93, R.38. It continued:

> He sort of rocked back on his heels and said, Wow, as he thought about the question and tried to parse it into its various subparts; and then after he thought about it for a minute, he came forward with a very solid, very genuine explanation in my eyes at least, a very well thought out explanation given the limited amount of time the man had to ponder the question.

Id.

I. Second Discussion of Racial Issues.

The court brought the juror in again, and addressed the same issue in much greater detail:

> [THE COURT:] In this case, there will be comments attributed to the Defendant by other witnesses that he says things to the effect that, That nigger was going to die anyway or -- the exact language, gentlemen?
>
> MR. WELSH: I think one of the comments attributed is that, The nigger shot himself.
>
> THE COURT: That the nigger shot himself. There may also be comments attributed to the Defendant referencing black people as porch monkeys or --
>
> MR. NEYMAN: I believe the expression that will be used is moon pies.
>
> THE COURT: Moon pie. Now, to these various comments, the Defendant has disavowed them, has denied them. But still, that type of evidence is apt to come in. And I want to be as sensitive as I can to your concerns and to everyone's concern for a fair trial.
>
> Would you be able to set aside the shock value, if you will, or the shock value of such racist statements ... and proceed to judge this case strictly on its merits and the credibility of the evidence as you determine it to be?

THE JUROR: **I mean, I've been called quite a few of those in my lifetime anyway.** So --

THE COURT: And can you go forward and be a fair and impartial juror under the circumstances that I have outlined?

THE JUROR: **I would be able to do my best on it.**

Id. at 96-98, R.41-43 (*Emphasis added*).

J. Final Ruling.

The court then immediately issued its final ruling regarding the juror. It stated:

> The Court finds there to be no cause for challenge of this juror. The Court finds this juror to be fair and impartial. The Court finds that the challenge is a mere sham. For all of those reasons, the gentleman will be seated as Juror 16.

Id. at 98, R.43. Defense counsel stated: "My objection, for the record." *Id.* Juror A ultimately served as the foreperson of the jury. *Tr.* 2/14/06 at 1144-1145.

V. JURY INSTRUCTIONS REGARDING PRIOR STATEMENTS.

In its final instructions, the court instructed the jury in part:

> With regard to the credibility of witnesses, let me say this about testimony and inconsistent statements: when someone comes to the witness stand, they're testifying based on their present memory of events, assuming they're abiding by the oath that they were given to tell the truth.
>
> If on a prior occasion before coming into the courtroom that witness has said something

different to somebody else in writing, or orally, however it may be, you can consider that inconsistent prior statement in your weighing the credibility of that witness' testimony.

If someone has made a prior inconsistent statement, inconsistent to their present testimony, you may use that as a tool in determination of credibility. You might decide that the prior inconsistent statement is of no consequence. It's immaterial. It's not important. That's your prerogative. You may cast it aside.

On the other hand, you might seize upon it and say, Wait a minute. This is an important clue to credibility. And I'm going to use this as I judge credibility of this witness. That's your prerogative as a juror to do that as well.

What you can't do is you cannot substitute that prior inconsistent statement for the truth of what the witness has said on the stand, unless, of course, the witness adopts the prior inconsistent statement as their present testimony. The inconsistent statement in the past is used only to judge credibility of the witness.

Tr. 2/14/06 at 1135-1136, R. 133-134. (*emphasis added*).

Neither side objected to this portion of the instructions.

SUMMARY OF THE ARGUMENT

The trial court erred in requiring defense counsel to give an explanation for his attempted peremptory challenge. (pp. 24-35). The trial court erred in ruling that defense counsel's reasonable and case-specific explanation for the peremptory challenge was a sham. (pp. 35-39). The trial court erred in failing to excuse the juror for cause after he was unable to unequivocally state that he could be an impartial juror. (pp. 39-40). The trial court erred in not allowing the defendant to exercise a peremptory challenge based on the juror's personal experiences and inability to state that he would be impartial. (pp. 41-43). The trial court erred in instructing the jury that it could not consider as substantive evidence certain prior statements, all of which were introduced without any request for a limiting instruction and some of which were independently admissible as grand jury statements. (pp. 44-46). Relief under §33E is appropriate where the defendant was judged by a juror who was both potentially partial and unwanted and important evidence was removed from the jury's consideration. (pp. 46-47).

ARGUMENT

SUMMARY OF APPLICABLE LAW.[3/]

I. RIGHT TO TRIAL BY IMPARTIAL JURY.

Both the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant the right to a trial by an impartial jury. *Commonwealth v. Guisti*, 434 Mass. 245, 251 (2001). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 721 (1961).

The trial judge is afforded a "large degree of discretion" in determining whether jurors are impartial, but must "be zealous to protect the rights of an accused." *Commonwealth v. Long*, 419 Mass. 798, 803 (1995). The judge must "examine jurors fully with respect to possible bias or prejudice" when "there is a substantial risk that jurors might be influenced by factors extraneous to the evidence presented to them." *Commonwealth v. Morales*, 440 Mass. 536, 548 (2003). The presence of even one juror who is not impartial violates a defendant's rights. *Long*, 419 Mass. at 803; *Ross v.*

[3/] The following summary of law applies to all the juror issues. The law applicable to the prior statements issue is set out in the argument section below.

Oklahoma, 487 U.S. 81, 85-86 (1988).

II. IMPORTANCE OF PEREMPTORY CHALLENGES.

One of the most important tools for achieving an impartial jury is the use of peremptory challenges. This Court has explained:

> While not explicitly guaranteed by the Federal Constitution or the Constitution of this Commonwealth, the purpose of peremptory challenges is to aid in assuring the constitutional right to a fair and impartial jury. *Commonwealth v. Wood*, 389 Mass. 552, 559-560, 451 N.E.2d 714 (1983).

Commonwealth v. Green, 420 Mass. 771, 776 (1995). It has said:

> The right to peremptory challenges in the Commonwealth has deep roots in both the common law and statute.... In the common law, the right to challenge a given number of jurors without showing cause was recognized as "one of the most important of the rights secured to the accused."

Commonwealth v. Jordan, 439 Mass. 47, 61 & 62 n.16 (2003), *quoting Pointer v. United States*, 151 U.S. 396, 408 (1894). The power to strike a juror is an "arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose"; further, Blackstone continues, the provision of peremptory challenges is "full of that tenderness and humanity to prisoners, for which our English laws are justly famous." *Lewis v. United States*, 146 U.S. 370, 378 (1892); *United States v. Blanton*, 719 F.2d 815, 838 (6th Cir. 1983),

quoting Blackstone, 4 *Commentaries* 352.

III. IMPROPER EXERCISE OF PEREMPTORY CHALLENGES.

Under modern jurisprudence the exercise of peremptory challenge is not entirely without limit. This Court has held that "exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group, contravenes the requirement inherent in art. 12 of the Declaration of Rights." *Commonwealth v. Soares*, 377 Mass. 461, 488 (1979). *See also Batson v. Kentucky*, 476 U.S. 79 (1986).

IV. PROCEDURE FOR EVALUATING A QUESTIONED PEREMPTORY CHALLENGE.

There is a "presumption that the exercise of a peremptory challenge is proper," although that presumption can be rebutted "if it is shown that (1) there is a pattern of excluding members of a discrete group; and (2) it is likely that individuals are being excluded solely because of their membership in this group." *Commonwealth v. Benoit*, 452 Mass. 212, 218 (2008). When the opposing party claims that a peremptory challenge has been made on improperly discriminatory grounds, "the trial judge should make a finding as to whether the requisite prima facie showing of impropriety has been made." *Commonwealth v. Burnett*, 418 Mass. 769,

771 (1994). The factors to be considered by the judge in determining whether there has been a "pattern" include the number or percentages of group members excluded; common group membership of the defendant and the jurors excluded; and common group membership of the victim and remaining jurors. *Green*, 420 Mass. at 777.

If the court determines that a prima facie showing has been made, the burden then shifts to the party exercising the peremptory challenge to "provide a group-neutral reason for challenging the venireperson in question." *Benoit*, 452 Mass. at 219. The proponent must give a "'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges." *Id.* The court must then:

> make an independent evaluation of the [party's] reasons and ... determine specifically whether the explanation was bona fide or a pretext.... This latter step involves more than a rubber stamping of the proffered reasons; it requires a meaningful consideration whether the challenge has a substantive basis or is impermissibly linked to race.

Id. at 219. The challenge will then be either allowed or disallowed.

V. STANDARDS OF REVIEW.

Errors in refusing to exclude jurors for cause require reversal where "juror prejudice is manifest." *Commonwealth v. Ascolillo*, 405 Mass. 456, 459-460 (1989).

An appellate court grants deference to a judge's ruling on whether there was a permissible ground for a peremptory challenge. *Commonwealth v. Rodriguez*, 431 Mass. 804, 811 (2000). However, "the erroneous denial of the right to exercise a proper peremptory challenge is reversible error without a showing of prejudice." *Commonwealth v. Auguste*, 414 Mass. 51, 58 (1992).

Under M.G.L. c. 278, §33E, this Court must consider "whether there was an error in the course of the trial (by defense counsel, the prosecutor, or the judge)" that creates a "substantial likelihood of a miscarriage of justice." *Commonwealth v. Wright*, 411 Mass. 678, 681 (1992).

APPLICATION OF LAW TO FACTS

I. INTRODUCTION TO JUROR CLAIMS.

The court made a series of related errors with respect to Juror A. The court first erred in requiring defense counsel to give an explanation for his peremptory strike of Juror A, then erred in evaluating that explanation, then erred in refusing to excuse the juror for cause after further questioning, and finally erred again in refusing to allow counsel to peremptorily strike the juror on the basis of the new information. Each of those errors independently requires reversal. Individually or in combination they resulted in having a

juror who was both unqualified and unwanted by the defense sitting in judgment on Prunty (indeed, serving as the foreperson of the jury). A new trial is required.

II. THE COURT ERRED IN REQUIRING DEFENSE COUNSEL TO GIVE AN EXPLANATION FOR HIS PEREMPTORY STRIKE OF JUROR A.

A. The Court Should Not Have Required Defense Counsel to Provide any Explanation.

The court required defense counsel to provide a justification for its peremptory strike of Juror A. It noted that there was no suggestion of a "pattern," as this was the first controversial challenge. It went on to find, however, that the Commonwealth had nonetheless met its burden of making "a prima facie showing of impropriety."

This finding was erroneous. There was simply no basis in the record for finding impropriety. There was no "pattern of excluding members of a discrete group," nor any solid foundation for concluding that Juror A was excluded "solely on the basis of [his] membership" in a discrete group. *Commonwealth v. Curtiss*, 424 Mass. 78, 80 (1997). To conclude otherwise would make a mockery of the long-cited "presumption of proper use of peremptory challenges," *Soares*, 377 Mass. at 489, as it would eliminate that presumption as to any initial challenge to a member of a protected group. That has not hitherto been the law. Counsel should not have been required to

offer any explanation for his challenge of Juror A. The juror should simply have been excused. Reversal is required.

B. The Requirement that There Be a "Pattern" of Inappropriate Peremptory Challenges Before an Explanation is Required Should Not Be Eliminated for Peremptory Challenges Exercised by Defendants. This Court Should Clarify that there must be an Actual Pattern of Challenges before an Explanation must be Given by a Defendant.

Although the Court routinely states that a "pattern" is necessary to establish a prima facie case sufficient to defeat the presumption of propriety, *see Benoit*, 452 Mass. at 218, it has also indicated that, in a situation where a peremptory has been offered to one of the first members of the discrete group to be considered, the trial court may have some discretion to require an explanation even in the absence of a determination of a pattern. See *Commonwealth v. Garrey*, 436 Mass. 422, 429 (2002); *Commonwealth v. Harris*, 409 Mass. 461, 464-467 (1991). The Court has explained the reason for this exception:

> This objective [that the jury be a fair cross-representation] remains one of critical importance, and is no less pressing when, as in this case, there is only one person in the particular jury venire who belongs to the same discrete community group as the defendant. Indeed, because there is a very real risk in such cases that all members of a particular group might be excluded from service, the chances that a final jury of truly diffuse impartiality will be assembled are significantly reduced.

Harris, 409 Mass. at 466. In that situation, all of the members of a protected group could be excluded improperly without ever establishing a problematic pattern. That is, under this exception to the oft-stated doctrine a pattern is actually not necessary to establish a prima facie showing. The Court should now clarify however that the *Harris* exception does not apply to a peremptory challenge exercised by a defendant.[4/]

[4/] This rule was first set out by the Court in *Harris*. There, the Court explained:

> [W]e hold that a party contesting the use of a single peremptory challenge can make a prima facie showing rebutting the presumption that the challenge was properly used simply by demonstrating that he is a member of a constitutionally protected, discrete community group, and that the only prospective juror of the same group has been peremptorily challenged.

409 Mass. at 466. In other words, the Court did not hold that challenge of a single member of a protected group could always substitute for a showing of a pattern, but rather that it would do so in the limited situation where the defendant himself was also a member of that protected group. By its language and logic, this rule would not apply to a peremptory challenge by a defendant (as the opposing party, the Commonwealth, could not show that it was also a member of a protected group).

The limited applicability of this rule was recognized by the Court in subsequent cases. In *Commonwealth v. Fryar*, 414 Mass. 732, 738 (1993), the Court applied this rule to a prosecutory's challenge, noting that "In [*Harris*], we pointed out that the challenge of a single prospective juror within a protected class could, **in some circumstances**, constitute a prima facie case of impropriety." (*Emphasis added*). In *Curtiss*, however, this Court applied the *Harris* rule

(continued...)

It should be understood that the *Harris* rule -- that a single peremptory can effectively qualify as or substitute for a "pattern" -- is essentially an overinclusive prophylactic rule. To avoid the possibility of allowing an improper peremptory challenge to pass unnoticed, the rule arbitrarily imposes a stricter requirement for early challenges than for late challenges, and a stricter requirement for challenges relating to a group that is very poorly represented in the *venire* rather than for a group well-represented.

(...continued)
to a defense peremptory, simply dispensing with the requirement that the objecting party be also a member of the same protected group. There was no analysis or stated justification for this expansion of *Harris'* limited scope.

Interestingly, in this Court's recent discussion of peremptories in *Rodriguez*, 457 Mass. 461 (2010), it properly described the *Harris* exception, reverting to the earlier formulation. It stated:

> "Evidence of a pattern of challenges of members of the same discrete group as the defendant is sufficient to rebut the presumption of proper use of challenges."... In addition, the presumption may be rebutted "by demonstrating that [the defendant] is a member of a constitutionally protected, discrete community group, and that the only prospective juror of the same group has been peremptorily challenged."

Id. at 470, *citing Harris*. There was no thus suggestion in *Rodriguez* that a prima facie showing sufficient to rebut the presumption could be based merely on the fact that a defendant challenged a single juror from a protected class.

This rule (or, rather, exception to the rule insisting on a pattern) is not without cost. Requiring counsel to detail their reasoning will expend the time and energy of both the court and the parties. (Indeed, if there were no cost attached the courts could simply require an explanation of every peremptory challenge.)

There is a certain logic in imposing the overinclusive and costly *Harris* rule on the Commonwealth. At the very least, it is consistent with the panoply of restrictions -- statutory, constitutional, and common-law -- applied to the Commonwealth and restricting the permissible methods for it to obtain a conviction. That is, it is perfectly permissible for the courts, in the interest of prophylactically preventing even the *possibility* of unconstitutional discrimination, to impose an additional burden on the Commonwealth, even if that burden makes it marginally more difficult to convict a defendant.[5/]

On the other hand, though, to impose this overinclusive rule on a *defendant* is inconsistent with the special constitutional protections afforded criminal defendants. Requiring an explanation forces the defense

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[5/] Further, while discrimination coming from either the defense or the prosecution is contrary to the Constitution, it certainly seems worse when the discrimination is initiated by the representatives of the Commonwealth.

attorney to disclose -- perhaps only implicitly but potentially quite crucially -- his strategy for jury selection, his view of the case, and perhaps even his intended defense.[6/] Further, given that jury-selection decisions are made often if not always in consultation with the defendant, forcing defense counsel to state the reasons for the challenge breaches the attorney-client privilege in a meaningful way. *See, generally,* Katherine Goldwasser, "Limiting a Criminal Defendant's Use of Peremptory Challenges," 102 Harv. L. Rev. 808, 832-833 (1989) ("requiring counsel to reveal to the court (and the prosecution) the professional judgments and trial strategy that inform his or her peremptory challenge decisions, in front of and after consultation with the defendant, could only diminish the defendant's confidence in counsel"). In short, to the extent there is any sense in imposing a strict, overinclusive rule on the

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[6/] Consider defense counsel who strikes a mathematician because it is the intended defense strategy to rely on larger emotional themes and to urge the jury not to get bogged down in minutiae and details, and the defense believes that a mathematician will not be as receptive to this approach. If counsel is forced to tell the court and the prosecutor that is the reason for his peremptory challenge, she can be sure that a competent prosecutor will take note and present her case accordingly. The theme may very well even be argued in opening statements, with the prosecutor saying: "Members of the jury, defense counsel is going to ask you to ignore the details of this case, and decide it just on emotion, but I urge you not to."

Commonwealth, there are very strong reasons not to do the same with respect to peremptory challenges by a defendant that do not constitute a pattern.

This Court should follow its clear precedent and explicitly limit the *Harris* exception to the circumstances actually set out in *Harris*. It should hold that defense counsel can be required to provide an explanation for a peremptory challenge only where there is actually a pattern of exclusionary challenges constituting a prima facie case of impropriety, and not every time counsel first strikes a member of a protected group. Here, where there was no such pattern, no explanation should have been demanded. Reversal is required.

III. THE COURT ERRED IN REJECTING DEFENSE COUNSEL'S PLAUSIBLE AND PERSUASIVE JUSTIFICATION FOR HIS PEREMPTORY STRIKE.

Defense counsel was ultimately required to provide an explanation for the exercise of his peremptory challenge of Juror A. In response, he immediately offered a detailed, juror-specific explanation for the challenge. That explanation turned on the juror's occupation, his spouse's occupation, their children, and also on the specific facts of the case. *See Benoit*, 452 Mass. at 224 ("We have held that a juror's occupation may be a sufficient and valid basis on which to justify the

exercise of a peremptory challenge"), *citing Garrey*, 436 Mass. at 429.

Many, if not most, peremptories are exercised on relatively minor grounds, such as a hunch, a feeling, or even a traditional categorical opposition to certain professions. Here, though, defense counsel's explanation was unusually detailed, specific, and persuasive. It was far from something that seemed to have been concocted on the spot or "sounded superficial." *Commonwealth v. Calderon*, 431 Mass. 21, 26 (2000). Yet the court rejected it as being fraudulent. This finding was error.

First, it should be noted that the argument voiced by the Commonwealth against the peremptory was without merit. The prosecutor stated: "on the face of this sheet the juror filled out, there is nothing, I would suggest, that he's anything other then [*sic*] a fair and impartial juror." *Tr.* 2/7/2006 at 87-88. This argument entirely misapprehends the point of peremptory challenges. As this Court has explained with respect to peremptories: "Defense counsel, however, [is] not required to establish that the jurors lacked impartiality. That is the kind of showing required for a challenge for cause." *Green*, 420 Mass. at 777. A defendant is perfectly entitled to exercise such peremptory challenges not merely on unfair or impartial jurors, but also on legally-qualified jurors

that the defendant suspects would be more likely than others to find him guilty. *See Holland v. Illinois*, 493 U.S. 474, 480 (1990) (peremptories traditionally exercised "both [by] the accused and the State to eliminate persons thought to be inclined against their interests"). That is, some "fair and impartial" jurors are more likely to convict under certain fact patterns than other "fair and impartial" jurors, and a defendant is entitled to exercise his peremptory challenges to exclude them. While the peremptory challenge is intended in part to provide a backup in case a partial juror is not otherwise challenged for cause, *see infra*, that is not its only purpose. As Blackstone said, the peremptory challenge is

> necessary ... that a prisoner ... should have a good opinion of his jury, the want of which might totally disconcert him ... [T]he law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such dislike.

Blackstone, 4 *Commentaries* 353. It is an "arbitrary and capricious" right, that, as the Court noted in *Soares*, may be exercised (so long as it does not violate anyone's constitutionally-protected rights) based on the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." 377 Mass. at 483-484, *quoted in Commonwealth v. Hampton*,

457 Mass. 152, 165 (2010). The Commonwealth's argument thus was legally misguided in suggesting that peremptory challenges can only be offered as to partial jurors.

Second, the court's stated reasoning was insufficient to justify its conclusion. It noted only that there was another teacher, and some other jurors with young children, on whom peremptory challenges had not been exercised. As a matter of logic, this hardly compels the conclusion that the defense peremptory of Juror A was improper. Not all teachers are the same (and retired teachers certainly will have different viewpoints than active teachers and administrators), and there is a great difference between merely having small children and being a teacher married to a school administrator. Further, it could be that for the other individuals discussed by the court, there was a strong countervailing reason for *not* excluding them from the jury.[7] It is

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[7] Consider an example of two engineers, one African-American and one white. The white juror smiles broadly at the defendant when he enters the courtroom and reminds the defendant of one of his close friends. For these reasons, the defense chooses not to exercise a peremptory challenge on him, even though defense counsel has doubts about the fact he is an engineer, a profession she usually tries to keep off a jury. The African-American engineer displays none of the same friendly signs, and the defense counsel chooses to exercise a peremptory. Surely in that situation a Court should not conclude that the reliance on the prospective juror's profession as an engineer was a sham, merely because an earlier engineer was not challenged.

important to realize that the court never even inquired of counsel why he did not challenge the other teacher or parent jurors but merely ruled counsel's explanation as to Juror A out of hand. Such an illogical ruling based on sheer speculation and partial information was therefore unfounded and need not be given any deference.

In short, after hearing a misguided argument from the Commonwealth and positing a confused rationale for its conclusion, the court held that a perfectly-reasonable and extensively-articulated ground for exercising a peremptory challenge was a sham. It thus required the defendant to be judged by a juror he validly wished to reject. The court's determination was erroneous and unsupported by the record, and reversal is therefore required.

IV. THE COURT ERRED IN REFUSING TO EXCLUDE JUROR A AFTER HIS RESPONSES TO ADDITIONAL *VOIR DIRE*.

The court decided to question Juror A regarding some of the racially-charged potential evidence. After the first round of questioning, the juror responded, "Wow," before explaining that he thought he could compartmentalize things. His second set of responses, after further inquiry, however, was much more equivocal. He first explained, after being told of several of the racial epithets involved, that he had "been called quite a few of those in my lifetime," a fact which strongly

suggests that the racially-tinged evidence would (and indeed did during this questioning) evoke a personal response based on past encounters. The court then asked if he could still be a fair juror. **His answer in response was telling: "I would be able to do my best on it." Thus, the juror never said that he even thought he could succeed in being fair.** He merely said that he would give it his best effort, which is far from the same thing.[8/] In *Long*, this Court found reversible error where the juror in question "never unequivocally stated that he would be impartial." 419 Mass. at 804. *See also Commonwealth v. Somers*, 44 Mass. App. Ct. 920, 922 (1998) (juror "could not unequivocally state that he would be impartial"). That is exactly the case here. Juror A should have been excused for cause, and the court's failure to do so was reversible error. In the same way, the refusal to exclude this juror for cause violated Prunty's rights under the Sixth and Fourteenth Amendments. *See Ross*, 487 U.S. at 85-86.

[8/] In other words, the issue is not whether the juror thought that he would *try* to be fair, but whether he thought he could *succeed* in being fair under the circumstances.

V. THE COURT ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL TO PEREMPTORILY STRIKE THE JUROR AFTER HE DISCLOSED PERSONAL EXPERIENCES AND HE GAVE AN EQUIVOCAL RESPONSE AS TO WHETHER HE COULD BE FAIR.

Finally, and perhaps most importantly, even after all of the questioning of the juror, after he admitted that he had been called racially-charged names (thus implying that that experience would inform his evaluation of the case), and after he was unable to unequivocally state that he would be able to be fair and impartial, defense counsel was still not allowed to use a peremptory challenge on him. This was error.

Even if the trial court were justified in determining that the juror could be impartial (although, as argued *supra*, it was not justified in reaching that conclusion), surely defense counsel was entitled to disagree with that evaluation, and thus to exercise a peremptory challenge. Indeed, while not the only use, that is perhaps the core and most important use of the peremptory challenge -- to exclude a potential juror about whom the judge and the defense counsel disagree. Here, though, the court found that the juror was impartial and then effectively precluded the defendant and defense counsel from disagreeing with that conclusion.

To be sure, peremptory challenges must be based on reasons "personal to the juror and not based on the

juror's group affiliation." *Rodriguez*, 431 Mass. at 809. There should be no doubt, however, that the reasons present here after the further questioning would qualify to justify a challenge. That is, although the juror's prior history with racial insults and his uncertainty about whether he could serve impartially may have been related, in an indirect sense, to his race, those particular facts are "personal" to the juror. They do not depend on broad stereotypes about how a member of a particular group would think or act. As the Court wrote in *Soares*, what Article 12 prohibits is the "use of peremptory challenges to exclude prospective jurors **solely** by virtue of their membership in, or affiliation with, particular, defined groupings in the community." 377 Mass. at 486 (*emphasis added*); *see also Calderon*, 431 Mass. at 26 n.3 (reasons must "pertain to the individual qualities of the prospective juror"). It does not prevent a defendant from challenging jurors who, for reasons perhaps connected with their race but rooted in their individual personal history, or based on equivocal responses to *voir dire* questioning, he believes cannot judge him fairly or favorably.[9/] Refusal to allow the

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[9/] Consider a prospective juror who believes himself to have been a victim of racial profiling by police officers and therefore admits in *voir dire* that he has a deep hostility to police officers and tends to

(continued...)

defense to challenge the juror in these circumstances was reversible error.

Finally, and independent of the argument *supra*, Prunty was entitled to exercise a peremptory when, as a result of the in-depth questioning of *voir doir*, there was a danger that the process itself had alienated the juror. Indeed, this was one of the two primary reasons for the peremptory cited by Blackstone. As he wrote:

> Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

Lewis, 146 U.S. at 376, *quoting* 4 Blackstone, *Commentaries* at 353: Here, where the court properly pressed the issue of racial comments, the defense was warranted at the end of that process in fearing that the questioning process itself may have alienated the juror, and to have used a peremptory for that reason.

(...continued)
disbelieve anything they say, although the court rehabilitates him and he ultimately states he will do his best to put aside those preconceptions. Surely in those circumstances a prosecutor would be entitled to strike the juror, even though the reason for the strike was connected -- in a historical sense at least -- with the juror's race. Such a strike would be permissible because it would be grounded not in assumptions about all people of that racial group, but rather in the specific facts of that person's life experience which had led him to regard police with suspicion.

VI. THE COURT ERRED IN REMOVING SUBSTANTIVE EVIDENCE OF PAPE'S PRIOR STATEMENTS FROM THE JURY'S CONSIDERATION, WHERE THOSE STATEMENTS HAD BEEN ADMITTED FOR THEIR TRUTH AND WITHOUT LIMITATION.

A. Summary of Applicable Law.

1. Substantive use of statements admitted without objection.

It is black-letter law that:

> Normally prior inconsistent statements are not admissible to establish the truth of the matter asserted.... Where there is no objection, however, and no request for a limiting instruction, the statements may be considered as substantive evidence.

Commonwealth v. Luce, 399 Mass. 479, 482 (1987).

2. Substantive use of grand jury statements.

Further, prior grand jury statements are admissible as substantive evidence, under certain circumstances. This Court recently explained:

> In *Commonwealth v. Daye*, 393 Mass. 55, 72-75, 469 N.E.2d 483 (1984), we concluded that prior inconsistent grand jury statements are admissible as probative evidence if specific conditions are met. There must be an opportunity for effective cross-examination of the witness at trial. *Id.* at 73, 469 N.E.2d 483. If the witness has no memory of the events to which the statement relates, this requirement of opportunity for meaningful cross-examination is not met. *Id.* In addition, the statement must clearly be "that of the witness, rather than the interrogator," i.e., the statement must not be coerced and must be more than a "mere confirmation or denial of an allegation by the interrogator," *id.* at 74-75, 469 N.E.2d 483.

Commonwealth v. Stewart, 454 Mass. 527, 533 (2009).[10]

3. Standard of review.

Unpreserved errors are reviewed under the "substantial likelihood of a miscarriage of justice" standard. *See Commonwealth v. Linton*, 456 Mass. 534, 560 n.19 (2010).

B. Application of Law to Facts.

The defense took particular care at trial in dwelling on the prior version of events told by Pape. In particular, it highlighted the many occasions and circumstances in which she said that she and Prunty were in the bathroom at the time of the shooting, and thus that Prunty could not have committed the crime, and the statements where she explicitly said Prunty was not guilty of the crime. The details of many of these prior statements were admitted. As there was no objection, and no request for a limiting instruction, they were admitted substantively. Further, the details of Pape's testimony to the grand jury would have been admissible substantively under *Daye* and its progeny even if the

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[10] Under certain circumstances, there may be another requirement if grand jury testimony is introduced by the Commonwealth. "[W]hen that testimony concerns an essential element of the crime, the Commonwealth must offer at least some corroborative evidence if there is to be sufficient evidence to warrant a conviction." *Commonwealth v. Clements*, 436 Mass. 190, 193 (2002). That requirement has no relevance here.

Commonwealth had tried to object.

Nonetheless, in its final instructions the court explicitly told the jury that it could not consider these statements for their truth. It removed valuable and directly exculpatory information -- evidence by a percipient witness that the defendant did not and could not have committed the crime -- from the jury's consideration. In the context of this case, this error caused a substantial likelihood of a miscarriage of justice. Further, removal of this evidence from the jury's consideration violated the defendant's rights under the Fifth, Sixth, and Fourteenth Amendments to due process and to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

VII. RELIEF IS REQUIRED UNDER §33E.

This case presents an unusual situation. The defendant made clear to the judge that he did not want a certain juror sitting in judgment on him. The court repeatedly denied his efforts to have him dismissed. Further, the court improperly instructed the jury that it could not consider crucial exculpatory evidence for its truth. Even if for some reason this Court concludes that none of these decisions, standing alone, warrant reversal, it should grant relief under §33E to ensure

that a defendant cannot be convicted of a capital crime in these circumstances after being denied the ability to strike a potential juror that he believed to be unfavorable or potentially unfair to him.

CONCLUSION

For the foregoing reasons, this Court should grant a new trial on all counts.

Respectfully submitted,

DANIEL PRUNTY

By his attorneys,

Charles W. Rankin, BBO #411780
Jonathan P. Harwell, BBO #662764
Rankin & Sultan
151 Merrimac Street
Boston, MA 02114
(617) 720-0011